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Supreme Court of the United States

OCTOBER TERM, 1936.

No. 217.

MIDLAND REALTY COMPANY, APPELLANT,

VS.

KANSAS CITY POWER & LIGHT COMPANY, APPELLEE.

APPEAL FROM THE SUPREME COURT OF THE STATE OF MISSOURI.

REPLY BRIEF FOR APPELLANT.

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1.

The first contention of appellee, in its brief herein, is that the contract in controversy was not such a property right as to be protected by the due process of law clause of the Federal Constitution. It says that such is true because Section 5, Article XII, of the Missouri Constitution, provides that "The exercise of the police power of the state shall never be abridged."

Appellee does not correctly or fully quote said constitutional provision, nor give its context. The section referred to occurs in the article of the Constitution of 1875 devoted to corporations. The full provision is as follows:

> "The exercise of the police power of the State shall never be abridged, or so construed as to permit corporations to conduct their business in such manner as to infringe upon the equal rights of individuals or the general well-being of the State."

Prior to 1875 the state constitution did not contain that or similar provision. Said provision of the constitution has been authoritatively construed by the Supreme Court of Missouri, *in banc*, in *State* v. *Railroad*, 242 Mo. 339 (1912), thus:

> "In 1875, that part of our Constitution relating to corporations was revised, and the following clause was added thereto:
>
> 'Sec. 5, Art. XII. The exercise of the police power of the State shall never be abridged, or so construed as to permit corporations to conduct their business in such manner as to infringe upon the equal rights of individuals or the general well-being of the State.'
>
> We cannot see that the foregoing enactment materially changed or enlarged the general police power as it had existed from the creation of our State. It was merely a constitutional declaration that the police power shall not be *construed* so as to exalt the rights of corporations above those of natural citizens or so as to disturb the general well-being of the State."

Under that authoritative decision of the Supreme Court *in banc*, construing Section 5, Article XII, of the

state constitution, which decision the court, in division, could not overrule, said section of the constitution has no particular bearing on the case at bar.

2.

Speaking of the effect claimed for said Section 5, Article XII of the Missouri Constitution, counsel for appellee, on page 18 of their brief, say:

> "And said rates becoming inoperative and unenforceable by virtue of the exercise of the State's prior, reserved right of the police power they ceased to be private contract rights. Therefore, when they are not private contract rights they cannot be impaired, and, not being contract rights, they certainly cease to be property rights subject to the protection of due process."

If counsel mean to say, merely, that the contract in controversy, when made, was subject to abrogation under the police power we will not differ with them. We frankly concede that the contract could have been abrogated, by the exercise of the police power in accordance with due process of law. If counsel mean to assert that this contract was not a good contract, and not a property right, until duly abrogated, simply because it was always subject to abrogation, we note that it has been authoritatively decided to the contrary.

So. Utilities Co. v. *City of Palatka,* 268 U. S. 232.
Hinkel D. G. Co. v. *Wich. Ind. Gas Co.,* 64 F. (2d) 881 (C. C. A.).

In the case first above cited this court, speaking through Mr. Justice Holmes, says:

> "The Supreme Court (of Florida) held that the city had power to grant the franchise and to make the contract, and that it had no power, of its own motion, to withdraw, but it concedes the unfettered power of the legislature to regulate the rates. On that ground the defendant contends that there is a lack of mutuality, and therefore that it is free, and cannot be held to rates that, in the absence of contract, it would be unconstitutional to impose. The argument cannot prevail. Without considering whether an agreement by the company in consideration of the grant of the franchise might not bind the company in some cases, even if it left the city free, it is perfectly plain that the fact that the contract might be overruled by a higher power does not destroy its binding effect between the parties when it is left undisturbed."

Since the contract in controversy was a binding one so long as it was "left undisturbed" it was a property right. Being such it could not be disturbed or taken away without due process of law. Assuming, without conceding, that the legislature might itself have abrogated the contract by direct action, such was not done here. No one claims that the Public Service Commission Law has any provision to the effect that "all existing contracts with public utilities are hereby abrogated." If this contract was abrogated it was by virtue of a delegated authority. To say that it could be abrogated by the mere filing of a schedule of rates by appellee would be to say that authority was delegated to appellee to abrogate the contract at its discretion and by its mere, *ex parte,* act. And, since this court says, in speaking of the exercise of the police power, "It is the intervention of the public interest which justifies, and at the same time, *conditions*

its exercise" (*Ark. Nat. Gas Co.* v. *Ark. Rd. Comm.*, 261 U. S. 379), to permit this utility company to abrogate the contract, by the mere filing of a schedule, would be to permit it to determine the fact of the intervention of the public interest. This "*reductio ad absurdum*" should alone demonstrate the unsoundness of the contention that the mere filing of a schedule by appellee sufficed lawfully to deprive appellant of its property right in this contract.

3.

Appellee, on page 21 of its brief, says:

> "It is common knowledge and an accepted fact of which this court will take judicial notice that all Public Service Commissions as well as the Interstate Commerce Commission have technical staffs of rate experts who carefully examine all filed rates by utilities as to their reasonableness before they are allowed to go into effect at the effective date, and that if there is any question as to their reasonableness a suspension order is issued and the rate suspended pending a hearing. Such commissions pass upon rates not only by a hearing, but by examination of filed rates pending their effective date."

We do not agree that this court may assume that the commission examined said schedule, on its being filed, and that the commission did not suspend it, within thirty days, because it was considered reasonable and lawful, and that the commission thus, tacitly, approved the schedule. The Missouri Commission, like other commissions, expressly repudiates the suggestion that it may be deemed to have approved any rates "excepting those which are made under its express orders."

Ind. Brewing Co. v. *Ry. Co.*, 4 Mo. P. S. C. l. c. 623.

Parlin & O. Co. v. *Rd.*, P. U. R. 1915A, 460 (La.).

Re N. Y. Steam Co., P. U. R. 1918B, 866 (N. Y.).

Ark. Fuel Co. v. *Rd. Co.*, 16 I. C. C. 95.

Poor Grain Co. v. *R. R. Co.*, 12 I. C. C. 418.

Coomes v. *Ry. Co.*, 13 I. C. C. 192.

In the case first above cited the Missouri Commission says:

> "Another defense urged is that by reason of the filing and publication of the rates, they have been approved by this commission. The power to publish rates is largely with the carriers and while the rates from Leadwood and the other points involved have been duly published, that alone carries with it no indication that the legal rate has been published. * * * The commission does not approve any rates, excepting those which are made under its direct orders; and the commission could not, of course, by its order impart validity to a rate which is prohibited by the constitution and the laws of this state."

The other commission decisions, above cited, are to the same effect.

Furthermore, our utilities act expressly denies any right in the commission to make a finding or order by silence or by implication. Section 5240, R. S. Mo., 1929, provides that "Every order, authorization or certificate issued or approved by the commission under any provision of this chapter shall be in writing and entered on the records of the commission."

That proviso of the act completely destroys the suggestion that the commission made, by implication, an order

that the contract in controversy was unreasonable, or an "authorization" for appellee to desist from performing it.

4.

The only finding or order the commission ever made concerning said schedule, filed in June, 1917, was as follows:

> "Ordered: 1. That the rates and prices now charged (referring to said schedule) by the defendant for steam heating service at Kansas City, Missouri, are unjust and unreasonable, and that said rates and prices are unreasonably high" (5 Mo. P. S. C., p. 682).

That finding and order was not appealed from and so became final. And, by virtue of Section 5238, R. S. Mo., 1929, said finding and order became conclusive, in this collateral action. In other words, said filed schedule was nullified. It was found not to be a lawful schedule. It was declared to be nil. The matter stands, therefore, as if said schedule had never been filed. How can such a schedule be made the basis of the cause of action attempted to be asserted in the first five counts of the petition herein?

Appellees says that because the commission, in a decision rendered several years later (8 Mo. P. S. C. 223), may have expressed the opinion, *arguendo,* that the commission, as composed in 1917, had mistakenly found said schedule to be unreasonable and unlawful, the former express and official finding and order of the commission, which was in writing (5 Mo. P. S. C. 682) and

entered of record, as the law provides (Sec. 5240, R. S. Mo., 1929), should not be accepted as conclusive, even though the statute declared it to be such. Whatever opinion the commission, as later composed, may have expressed about the finding of the commission, as composed in 1917, it is certain that the commission, in the later decision, did not make any lawful finding or order, or any at all, with respect to the schedule in question, filed in 1917. The only findings and orders of the commission in said later decision are found on pages 297-300, 8 Mo. P. S. C. Reports. It is equally certain that the commission, in said later decision, did not even attempt to resurrect, to reinstate or to validate the schedule which had been officially declared to be nil.

Even though it can be said that in the later decision (8 Mo. P. S. C. 223) the commission made a finding which had the force and effect of a law, or that was equivalent to the enactment of a law, the complete answer is that the Missouri Constitution (Sec. 15, Art. II) forbids the enactment of a law "retrospective in its operation." In *Gast R. & I. Co.* v. *Schneider*, 296 Mo. 687, the first syllabus, fully supported by the opinion, is as follows:

> "The constitution inhibits the enactment of any law 'retrospective in its operation,' and a retrospective statute is one which * * * takes away or impairs any vested rights * * *; one which creates a new ground for the support of an existing action * * *."

Appellee's cause of action, if any, in the first five counts of the petition arose in March, 1918. If appellee had then brought suit, as it might have, based upon the schedule filed June 19, 1917, and had tried the suit at once, it must have failed by reason of the finding and order of the commission, rendered February 11, 1918 (5 Mo. P. S. C. 664), nullifying said schedule. Therefore, appellee does and must depend, in order to recover herein, upon a finding in the decision of the commission rendered in 1919 (8 Mo. P. S. C. 223), after the contract in question had been performed and had expired. In other words, appellee must not only show that said later decision, as being the enactment of a law, undertook to make a finding, validating the said schedule of 1917, but appellee must escape the constitutional inhibition against a retrospective law, which is defined as "one which takes away or impairs any vested right acquired under existing laws," or as "one which creates a new ground for the support of an existing action."

As before stated, appellee's cause of action, if any, existed prior to the commission's decision of 1919 (8 Mo. P. S. C. 223). To depend upon a finding in that decision is to rely upon an enactment "which creates a new ground for the support of an existing action," which the constitution inhibits. Said later decision of the commission can have no potency in this case.

5.

The Case of Wichita Rd. & L. Co. v. P. U. Comm., 260 U. S. 48.

Appellee insists that the *Wichita Case, supra,* is not in point because "The decision was based upon a Kan-

sas statute wholly unlike Missouri's" (Brief for Appellee 29). The Kansas statutes referred to in the Wichita case are, first, Sections 13 and 16 of the Public Utility Act (Rev. Stat. Kan., 1923, Chapter 66, Secs. 110, 113). Said sections provide that "upon such hearing and investigation" the commission may promulgate rates. It is further provided that all orders and decisions of the commission, affecting rates, "shall be reduced to writing," etc. Said sections correspond to Sections 5190 (5) and 5191, Rev. Stat. Mo., 1929.

In the Missouri statutes, as in the Kansas statutes, in *every* instance, without exception, where the commission is authorized to make a finding or order concerning utility rates the statute provides that the same may be done only "after a hearing," or "after a full hearing," or "after due hearing."

An examination of the said Kansas and Missouri statutes above referred to will disclose that they are practically alike in substance. Appellee does not point out any essential difference.

The third section of the Kansas statutes referred to in the Wichita case is Section 20 of the Utility Act (Rev. Stat. Kan., 1923, Ch. 66, Sec. 117). That is the section which permits a utility to itself file a schedule of rates. The corresponding Missouri statute is Section 5190, Paragraph 12, R. S. Mo., 1929. The only substantial difference between the two statutes is that the Kansas statute does not permit a filed schedule, which changes rates, to go into effect "without the consent of the commission." The said Missouri statute has no such proviso. So, it will be seen that the Missouri statute

is less favorable to the contention of appellee here than is the Kansas statute. It appears in said Wichita case that there was at least an order of the Kansas Commission consenting that the schedule, there in question, be filed and go into effect. No order whatsoever was made by the Missouri Commission concerning the schedule here in question. As this court concluded that a schedule filed with the consent and upon the express order of the commission did not suffice to abrogate the contract in question in the Wichita case, how can it be argued that the mere filing of the schedule, here in question, without any order at all of the commission, deprived appellant of its contract in accordance with due process of law? We again hazard the statement that the ultimate conclusion reached by this court, in said Wichita case, was based mainly "on principles of constitutional government" rather than "on the language in the statute" of Kansas.

We note, in connection with the *Wichita Case, supra,* that in this court the appellee in that case, the commission, relied most strongly upon the *Kansas City Bolt and Nut Co. Case,* (275 Mo. 529, 252 U. S. 571) and upon the case of *Union Dry Goods Co. v. Ga. P. S. C.,* (248 U. S. 372) upon the authority of which the Bolt & Nut Co. case was affirmed by this court. The appellee here relies strongly upon the same cases. It seems clear from the court's opinion in said Wichita case that this court did not consider said cases to be there in point. And we submit that they are not pertinent, in the least degree, to the case at bar. The legal questions here raised were not involved in those cases.

6.

Appellee complains because appellant calls attention to the fact that appellant did not own one of the buildings to which appellee furnished steam heat, under the contract. Counsel for appellee says: "We submit that in pressing such an argument, appellant asks this court to rule on a pure question of fact, not related to any federal question, and that this court should not do so" (Br. 37). Counsel are quite incorrect in saying that "appellant asks this court to rule on a pure question of fact." The fact appears, unquestioned, in the record. We call the court's attention to said fact, of which appellee had knowledge, as it appears upon the face of the contract in question (Rec. 48), as clearly indicating that the steam heating service rendered by appellee to appellant was rendered pursuant to the contract in question. Except by virtue of the contract, appellee cannot justify this suit against appellant for service to a building which appellant did not own. In other words, it clearly appears that the contract was performed on both sides, and that appellant's rights thereunder became vested. The judgment of the Missouri Supreme Court violates such vested rights and deprives appellant thereof without compensation, that is, without due process of law.

7.

Counsel for appellee, in their brief, have much to say about appellee's numerous contracts made since the Public Service Commission Law was enacted. They say that appellee now has 125,000 of such (Br. 33). We will excuse appellee's going outside the record to make that

statement, as it demonstrates that appellee's private weal, as well as the public weal, has not suffered by reason of appellee's performance of the contract in controversy. Contracts made since the enactment of the commission statute are controlled by the act, and the regulations of the commission issued pursuant thereto. When a utility files a schedule of rates, it files a form of contract for its customers. Such form of contract is part and parcel of the filed schedule. If the utility desires to make a *special* contract with a customer the document must be filed with and have the approval of the commission before it becomes a contract. In this connection, we hazard the statement that if a utility desired to terminate or abrogate such a special contract, which the commission had approved, it could not do so by the mere filing of a new and different schedule of rates for that customer. It is obvious that such a contract could not be abrogated except upon a hearing, on notice, and upon an order by the commission. Just so, a special contract made before the commission statute was enacted, being a perfectly good and valid contract, could not be lawfully or effectually abrogated without a proper hearing, finding and order of the commission with respect thereto. Common sense and the simplest and most elementary principles of law point unerringly to that conclusion. The intervention of the public weal conditions the exercise of the power to abrogate a contract, and there must, necessarily, be some authoritative finding of the fact of the intervention of the public interest in any particular case. Assuredly a public utility company cannot be the complainant and also the judge and jury in such matter.

8.

Point 4 of appellee's brief (37-40) is an attempted answer to Point C of appellant's argument (Appellant's Brief 28-35). Counsel for appellee say: "Under Point C of its brief, appellant seeks to have this court alter the construction placed upon Missouri statutes by the Supreme Court of Missouri." That is quite incorrect. Appellant does not question the *construction* put by the *court upon Section 5208, R. S. Mo., 1929.* The Missouri court concedes, seemingly, that said Section 5208 is applicable to heating companies. It speaks of the same as being "the statute purporting to preserve existing contracts" (for heating service). We say that, having adopted such construction of the statute, the Missouri court erred in refusing to give the statute the effect which legally and necessarily flows from the construction put upon it. We say that the court gives no valid reason, if any, why the statute does not do what the court says that it "purports" to do, namely, what the legislature intended it to do. We say that if the statute, according to legislative intendment, is one "purporting to preserve existing contracts" (to quote the Missouri Supreme Court's language), of which the contract in controversy was one, then, by legislative command, "Nothing in this act (Public Service Commission Law) shall be construed to prevent (appellee) from continuing to furnish * * * service under" said contract (Section 5208, R. S. Mo., 1929). Accordingly, appellant's said contract was not abrogated by legislative authority, or by virtue of any act which was here done under any

section of the statute. If the contract was not abrogated by the mere filing of a schedule of rates, under Section 5190, R. S. Mo., 1929, then the judgment of the Supreme Court of Missouri deprives appellant of its property right in the contract without its being legislatively abrogated, *i. e.*, without due process of law.

The argument of appellee here that said Section 5208 ought not to have been made applicable to heating companies was made to the Missouri Supreme Court, but was not accepted by it. The argument is one that might well have been made to the legislature, but is not an appropriate argument to a court. If the legislature saw fit to preserve existing contracts of heating companies, or to decline to abrogate them, such was within the rightful and exclusive province of the legislature (*Ark. Nat. Gas Co.* v. *Ark. Rd. Comm.*, 261 U. S. 379). The legislature did not thereby abridge or bargain away the police power of the state. It merely declined, as was its right, to exercise it to the fullest possible extent. The same legislature or any subsequent one could have amended or repealed Section 5208, if it so saw fit. There was no agreement not to do so.

Appellant does not claim that the existence of its contract, here in question, prevented the legislature from undertaking to abrogate it. Appellant says, merely, that the legislature, in its rightful discretion, did not see fit to undertake or to authorize its abrogation. Appellant further says that the Supreme Court of Missouri, Division No. 1, undertook, by its judgment herein,

to abrogate, judicially, said contract and that, in so doing, said court usurped a legislative jurisdiction, which was beyond its power to assume. The judgment of said court herein did not, therefore, afford to appellant due process of law in the taking of its property. In *State* v. *Anderson*, 12 Mo. App. 214 (affirmed by Supreme Court, 77 Mo. 110), the court says:

> "But from its very nature, the police power is a power to be exercised within wide limits of legislative discretion; and if a statute appears to be within the apparent scope of this power, it would be a usurpation of jurisdiction for the judicial courts to inquire into its wisdom and policy, or to undertake to substitute their discretion for that of the legislature."

Respectfully submitted,

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